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No. 84-850

In the Supreme Court of the United States

OCTOBER TERM, 1984

FRANCIS A. VITELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether, in the circumstances of this case, the courts below correctly held that documents seized pursuant to a state search warrant, issued upon information obtained through an allegedly illegal state wiretap, were properly used as a basis for federal civil tax assessments.

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 15) is noted at 745 F.2d 44 (Table). The opinion of the district court (Pet. App. 16-27) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28) was entered on September 25, 1984, and the petition for a writ of certiorari was filed on November 21, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. On April 24, 1972, upon application of an assistant district attorney for Suffolk County, Massachusetts, a judge of the Suffolk Superior Court issued a warrant for a wiretap to last 15 days, pursuant to Mass. Ann. Laws ch. 272, § 99(I)(2) (Michie/Law. Co-op. 1980), which, for present purposes, substantially tracks the requirements of 18

U.S.C. 2518(4)(e) and (5).[1] The wiretap was conducted as part of a Boston City Police investigation into suspected gambling activity. The information gathered from the wiretap prompted the assistant district attorney to apply, on May 10, 1972, for a warrant to tap two additional phone numbers. Pet. App. 16-17. The assistant district attorney stated in his application for the additional wiretaps that " 'the interception is required to be maintained for a period of 15 calendar days' " (*id.* at 17). The same judge who had authorized the first wiretap signed a warrant for the additional wiretaps. The second warrant did not, however, contain the 15-day limitation language. *Ibid.*

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[1]Mass. Ann. Laws. ch. 272, § 99(I)(2) (Michie/Law. Co-op. 1980) provides in pertinent part as follows:

> I. Warrants: form and content.
>
> A warrant must contain the following:
>
> * * * * *
>
> 2. The date of issuance, the date of effect, and termination date which in no event shall exceed thirty days from the date of effect. The warrant shall permit interception of oral or wire communications for a period not to exceed fifteen days. * * *

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518, provides in pertinent part as follows:

> (4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify —
>
> * * * * *
>
> (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.
>
> * * * * *
>
> (5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. * * *

The wiretaps authorized by the May 10 warrant commenced on May 12 and lasted for 12 days. The wiretaps produced evidence that provided probable cause for the issuance of a state warrant to search petitioner's home, and that search was conducted on May 25, 1972. Subsequent to petitioner's arrest for violations of the state gambling laws, the Boston Police Department gave the Internal Revenue Service certain documents that had been seized during the search of petitioner's home. Those documents formed the basis for the deficiency assessment at issue in this civil tax proceeding. Pet. App. 17.

2. Petitioner was tried and convicted for several violations of the state gambling laws. His conviction was upheld by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Vitello*, 367 Mass. 224, 327 N.E.2d 819 (1975). In his appeal to that court, petitioner argued, inter alia, that the second wiretap warrant was invalid because it lacked a termination date and that any evidence obtained as a result of the wiretap warrant should be suppressed as "fruit of the poisonous tree."

The Supreme Judicial Court of Massachusetts concluded that the termination date was omitted through inadvertence.[2] The court held that the application for the warrant, which requested authorization for a 15-day wiretap and which, under Massachusetts law, was deemed to be incorporated in the warrant, cured the warrant's facial defect. 367 Mass. at 271-272, 327 N.E.2d at 846. The court thus

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[2]The state court noted that the warrant was prepared in the district attorney's office, that the omission of a termination date was due to a typographical error, and that the issuing judge was unaware of the absence of a time limitation when he signed the warrant. 367 Mass. at 271, 327 N.E.2d at 846.

concluded that suppression was not mandated in the circumstances of that case. 367 Mass. at 274, 327 N.E.2d at 848.[3]

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. The district court granted the petition. *Vitello* v. *Gaughan*, 414 F. Supp. 26 (1976). The district court reasoned that, absent a time limitation in the wiretap warrant, the warrant was facially invalid. *Id.* 27. Notwithstanding the state court's contrary holding under Massachusetts law, the district court concluded that the application did not cure the defect in the warrant because the application was neither attached to the warrant nor specifically incorporated by reference. *Id.* at 27-28.

On appeal, the First Circuit reversed and ordered the habeas corpus petition dismissed. *Vitello* v. *Gaughan*, 544 F.2d 17 (1976). Without deciding whether the application and the warrant should be read together, the court reasoned that petitioner had not been prejudiced by the inadvertent omission of a termination date in the warrant. The court therefore concluded that suppression was inappropriate, noting that Congress's concern was with "substantive excesses, not stenographic error" (*id.* at 19).

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[3]Petitioner challenged his state conviction on other grounds as well. *Commonwealth* v. *Vitello*, 367 Mass. at 234-241, 327 N.E.2d at 827-831. With regard to wiretap issues, petitioner contended that the Massachusetts state wiretap statute was unconstitutional under the Supremacy Clause of the United States Constitution, alleging that it conflicted with the federal wiretap provisions in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520. The Supreme Judicial Court of Massachusetts held that the state statute was in substantial compliance with the federal statute and was not preempted by federal law. 367 Mass. at 251, 327 N.E.2d at 836. See also *United States* v. *Smith*, 726 F.2d 852 (1st Cir. 1984) (en banc).

3. On June 1, 1972, the government asserted against petitioner a deficiency of $1,730,377.40 in wagering excise taxes for the period January 1, 1966, through April 1972. After paying a portion of the asserted deficiency, petitioner commenced the instant refund litigation in the United States District Court for the District of Massachusetts.

In the district court, the parties stipulated that the documents seized pursuant to the state search warrant, which was, in turn, based on information derived from the state wiretaps, were the sole basis for the assessment. The parties further stipulated that the amount of the assessment against petitioner was correct. Accordingly, the district court addressed only the legal questions whether, as a matter of federal law, the assessment was based on information derived from a wiretap that violated 18 U.S.C. 2518(4)(e) and, if so, whether suppression was required.

The district court granted the government's motion for summary judgment (Pet. App. 16-27). The court concluded that the wiretap warrant was facially invalid but that suppression of the documents seized pursuant to the search warrant was not required in this case. The court held that not every technical violation of the federal wiretap statute, 18 U.S.C. 2510 *et seq.*, requires suppression. Stressing the narrowness of its holding, the district court concluded (Pet. App. 27):

> I have rested my conclusions here on the undisputed facts that the omission was a technical, clerical error that was not intended by the officials in charge and did not realistically benefit their activities; that, in all other respects, the investigating officers acted in strict compliance with applicable law; and that [petitioner's] rights were not prejudiced in any discernible way by the error.

The court of appeals unanimously affirmed without issuing an opinion (Pet. App. 15).

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. At the outset, we note that the validity of the state wiretap warrant is a question of state law. See, *e.g.*, *United States* v. *Jarabek*, 726 F.2d 889, 900 (1st. Cir. 1984); *United States* v. *Manfredi*, 488 F.2d 588, 598 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).[4] Although the district court below examined the matter anew as a question of federal law (see Pet. App. 21-23), the holding of the Supreme Judicial Court of Massachusetts that the warrant was valid should have been accorded conclusive effect. Under that court's interpretation of Mass. Ann. Laws. ch. 272, § 99(I)(2) (Michie/Law. Co-op. 1980), the warrant was not facially invalid because the underlying application, which contained the required termination date, was deemed to be incorporated in the warrant. See page 3, *supra*. The same conclusion has been reached in construing the law of other jurisdictions. *United States* v. *Cirillo*, 499 F.2d 872, 879 (2d Cir.), cert. denied, 419 U.S. 1056 (1974); *United States* v. *Rizzo*, 492 F.2d 443, 446 (2d Cir.), cert. denied, 417 U.S. 944 (1974); *United States* v. *Manfredi*, 488 F.2d at

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[4] 18 U.S.C. 2516 requires state wiretaps to conform to the requirements of federal law as set forth in 18 U.S.C. 2518. But because the applicable requirements of Massachusetts and federal law regarding termination dates are substantially identical, analysis under federal law of the validity of the wiretap warrant here at issue would not produce a different result from that reached under the state law analysis employed in *Commonwealth* v. *Vitello, supra*.

598; *United States* v. *Tortorello*, 480 F.2d 764, 781 (2d Cir.), cert. denied, 414 U.S. 866 (1973).[5]

2. Even if it be assumed that the state wiretap warrant was defective under state or federal law, no authority supports petitioner's contention (Pet. 10) that *all* facial insufficiencies mandate suppression under 18 U.S.C. 2518(10)(a)(ii). Just as this Court has held that not every "unlawful interception" requires suppression under 18 U.S.C. 2518(10)(a)(i) (*United States* v. *Giordano*, 416 U.S. 505, 527 (1974)), so too, common sense compels the conclusion that Congress did not intend automatic suppression in the case of every facial insufficiency. Indeed, petitioner himself concedes (Pet. 11) that "actual compliance" with the requirements of Title III may be sufficient to overcome "minor" or "technical" facial defects. That is the situation in this case. The wiretap terminated after 12 days, well within the period requested in the application and well within the 30-day period authorized by federal law. It is therefore undisputed that there was actual compliance with state and federal law, and thus no substantial requirement of Title III was violated. In these circumstances, the lower courts' reliance on *Giordano* and *United States* v. *Chavez*, 416 U.S. 562 (1974), was entirely appropriate.

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[5]Even if the validity of the wiretap warrant were to be tested under federal law, petitioner has not shown that, when read in "a commonsense and realistic fashion" (*United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)), the warrant, together with the underlying application, suffered from any fatal defect.

Petitioner's claim (Pet. 13-14) that the decisions below conflict with *United States* v. *Lamonge*, 458 F.2d 197 (6th Cir. 1972), is misplaced. The federal wiretap warrant at issue in *Lamonge* lacked a date of issuance, which effectively permitted a wiretap of unlimited duration. Here, the state wiretap was limited in accordance with the application, and the wiretap did not result in a longer invasion of petitioner's privacy than was justified by probable cause. Cf. *Berger* v. *New York*, 388 U.S. 41, 59 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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